TUKWILA TERMINAL LLC

October 9, 2008

VIA HAND DELIVERY AND ELECTRONIC TRANSMISSION

Mr. Jack Pace
Director of Community Development
Department of Community Development
6300 Southcenter Parkway Boulevard, Suite #100
Tukwila, WA 98188

Re: Draft Tukwila Shoreline Master Program
Parcel #'s 336590-1955, 336590-1960, 336590-1970 and 336590-1975
(commonly known as 6440 South 143rd Street, Tukwila ("Tukwila Terminal"))

Dear Mr. Pace,

In furtherance of our letter to you dated August 27, 2008 I would like to confirm that Tukwila Terminal, LLC adopts and joins in the concerns raised to the Tukwila Planning Commission on behalf of La Pianta LLC by the McCullough Hill law firm contained in its letters dated August 27, 2008, August 28, 2008 (enclosing "Comments to the July 2008 Draft Shoreline Master Program") and October 1, 2008, copies of which are enclosed.

Enclosed is a photo of our truck terminal property with an overlay of the existing and proposed buffers. Please note that more than 50% of our existing truck service doors face the river and the vast majority of our property is impacted by the proposed buffer revisions – this into a property with a "natural" shoreline along the Green River. The river as it adjoins our property is in its natural state, *i.e.*, no levy or dike is present in this stretch of the river. There is absolutely no need for "restoration" or "enhancement" in this natural portion of the river.

Also note the location of the existing Green River Public Path and Greenbelt along the riverbank adjoining the existing 40 foot buffer on our property. This public access was provided through a compensable taking by King County. When condemning the shoreline access pathway King County provided access to the pathway at the end of S. 143rd Street and at Interurban Avenue. No access to the pathway from South 143rd Street across our property was deemed necessary. The issues of existing environmental and improved conditions on impacted properties along with the issues of conditions of public necessity, compensation, safety, security, liability and privacy are not addressed in the draft program, nor does it even recognize the presence and utility of the existing pathway.

The proposed Shoreline Master Program seems to adopt a "one size fits all" approach, failing to recognize the diverse impacts on individual properties, the necessity for, let alone the alternatives for mitigation. The simple exercise of drawing a before and after line across all potentially

600 UNIVERSITY STREET - SUITE 1925 - SEATTLE, WA 98101
206.903.0333-PHONE 206.903.0555-FACSIMILE

impacted properties with a schedule of artificial riverbanks is illustrative of the potential environmental, practical and economic impacts this proposal would have on existing permitted land uses.

It is our firm belief that the proposed Shoreline Master Program fails to adequately address alternatives site specific conditions and economic impacts. As proposed we firmly believe the Shoreline Master Program would infringe on our private property rights and will constitute an illegal and unconstitutional taking.

My brother, Sid, and I would welcome the opportunity to participate in the public process necessary to properly evaluate the proposed draft Tukwila Shoreline Master Program. In the end this process will best serve all stake holders.

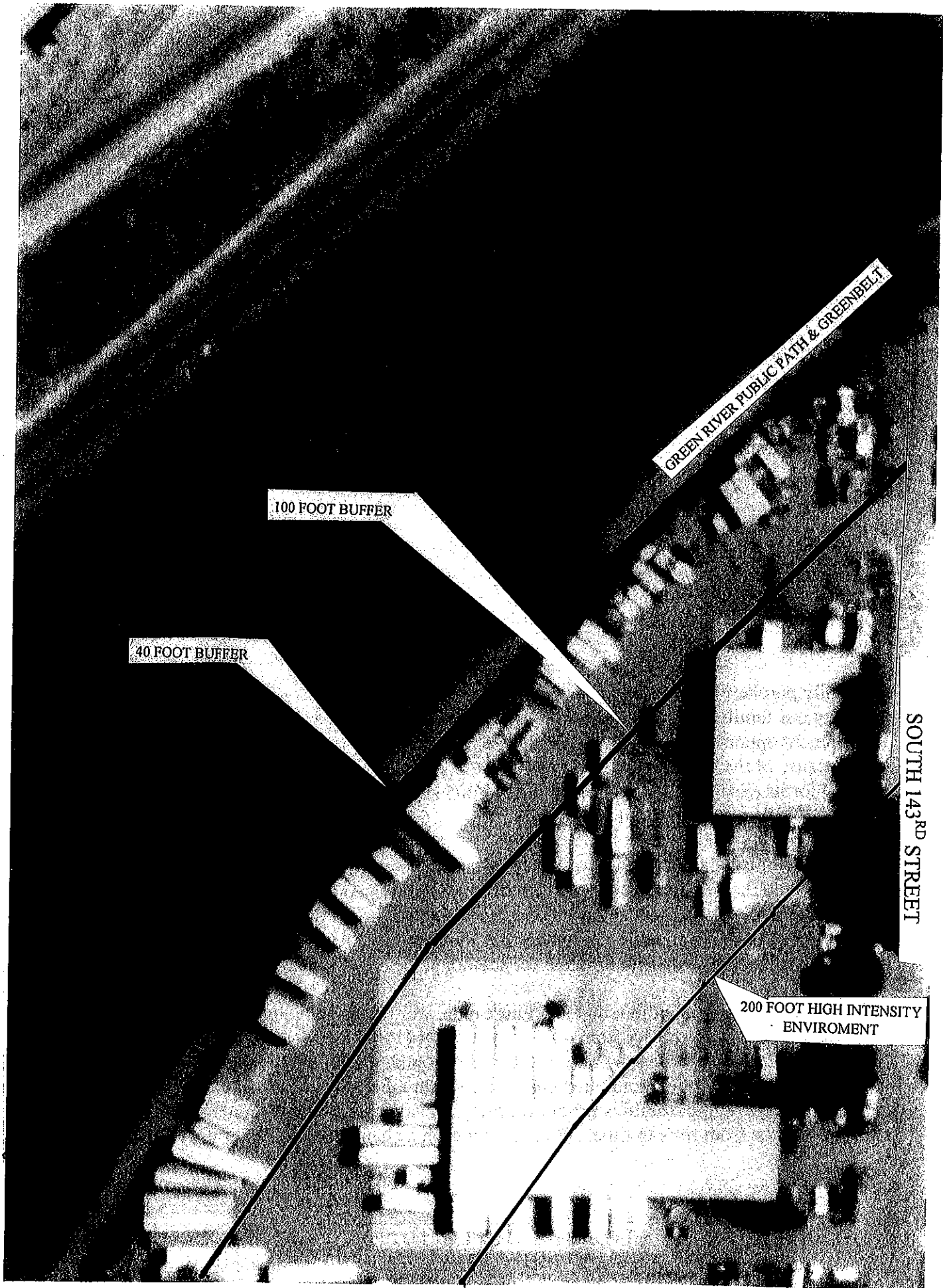
Sincerely,

Jim Eland
Tukwila Terminal LLC

cc: James E. Hadley, Esq.
Ryan, Swanson & Cleveland, PLLC

Tukwila Planning Commission w/o enclosures

TUKWILA TERMINAL LLC



TUKWILA TERMINAL LLC

August 27, 2008

VIA HAND DELIVERY AND ELECTRONIC TRANSMISSION

Mr. Jack Pace
Director of Community Development
Department of Community Development
6300 Southcenter Parkway Boulevard, Suite #100
Tukwila, WA 98188

Re: Draft Tukwila Shoreline Master Program
Parcel #'s 336590-1955, 336590-1960, 336590-1970 and 336590-1975
(commonly known as 6440 South 143rd Street, Tukwila ("Tukwila Terminal"))

Dear Mr. Pace,

Tukwila Terminal, LLC owns the above referenced property which abuts the Green River north of I-405 in Tukwila. This property is designated Urban Conservatory Shoreline Environment in the draft Tukwila Shoreline Master Program. We **strongly disagree** with the City of Tukwila's proposed determination that the changes affecting the use of our property is one of non-significance.

My family purchased the Tukwila Terminal properties in the early 1970's for the dual purpose of operating our family trucking business (Best Way Motor Freight) and for future investment/ development opportunities. We chose to locate the Tukwila Terminal in the Urban Conservatory Area because of the Commercial/Light Industrial zoning the City of Tukwila designated for this area and for its excellent ingress/egress to I-5, I-405 and SR-99 (less than one mile away) as well as close proximity to metropolitan areas.

The truck terminal, shop and truck yard storage space were originally designed, permitted and developed with the full approval of the City of Tukwila. We continue to incur substantial expense in complying with all environmental and land use laws. We have always attempted to conduct our business in an environmentally sensitive manner. At the present time the Tukwila Terminal is utilized as a distribution hub for a national beverage manufacture/marketer.

It has always been our intention, that at a future date, we would redevelop this property. The proposed increase of the buffer from 40 feet to 100 feet (150% increase) accompanied by proposed height and other restrictions on future development within 200 feet of the shoreline will have a devastating effect on continued operations of our current business as well as significantly curtail development opportunities for our property. As a matter of course tenants in the Tukwila Terminal change from time to time. We note that such a change could trigger the imposition of

600 UNIVERSITY STREET - SUITE 1925 - SEATTLE, WA 98101
206.903.0333-PHONE 206.903.0555-FACSIMILE

the proposed shoreline setback requirements impairing our ability to lease this facility to others due to the effective loss of 45,600 square feet of outside trailer storage area.

The Tukwila Terminal property was originally purchased and developed because of Tukwila's existing zoning, setback and other building requirements. The proposed Tukwila Shoreline Master Program Update could result in a noncompensable taking of approximately 31% of our property making it largely unusable in many development/redevelopment scenarios.

We have already been forced to give the City of Tukwila an easement on the river side of our property to provide public access through our property. We believe the magnitude of another taking through increasing the size of the buffers thereby enlarging public use of this property is not related to or proportional to its impact on our property rights, and an illegal taking of our private property interests. Although creating a Green River "greenbelt" and creation of shoreline habitat may be a laudable goal, these are public purposes that should be paid for by government, not by private property owners.

We would also like to go on record in stating that the notice of this proposal was not given in a timely fashion and does not provide sufficient time for thoughtful analysis and response. The Certificate of Non Significance was issued on August 13, 2008; notice was received by us on approximately August 20, 2008. This has left us with little more than a week to file this letter of opposition with the Department of Community Development. The flier we received, which was the "notice", frankly looks like a piece of junk mail. We have not in this short period had an opportunity to thoroughly review the 122 page Draft Shoreline Master Program in order to be fully prepared to address its implication on us as affected landowners. A week is simply not enough time in which to comment.

In conclusion, we would again like to stress that the Tukwila Shoreline Master Program Update will change the urban environment that was thoughtfully created for this area. Thus the Certificate of Determination of Non-Significance **will have a significant impact** on all commercial, Light Industrial and residential property owners with properties adjoining the Green River. We respectfully request that The City of Tukwila stop the review process and develop a revised draft of the Shoreline Master Program after meaningful public participation.

Sincerely,

Jim Eland
Tukwila Terminal LLC

cc: James E. Hadley, Esq.
Ryan, Swanson & Cleveland, PLLC

October 1, 2008

VIA ELECTRONIC AND REGULAR MAIL

Tukwila Planning Commission
c/o Department of Community Development
6300 Southcenter Blvd., #100
Tukwila, WA 98188

RE: Shoreline Master Program Update

Dear Commissioners:

We are writing on behalf of La Pianta LLC ("La Pianta"). We previously submitted written comments on behalf of La Pianta on August 7 and August 28, 2008. The City has informed us that it will not begin to prepare responses to public comment until after the last public hearing currently scheduled for this matter, on October 9, 2008, and that therefore the earliest the public can expect responses is late October.

We now write again to request that the Planning Commission:

(1) Provide for meaningful public participation, including directing staff to assemble a Citizens' Stakeholder Committee; and

(2) Recommend denial of the Tukwila Shoreline Master Program ("SMP") Update as currently drafted due to numerous flaws.

The bases for these requests are discussed below.

I. THE CITY MUST PROVIDE FOR MEANINGFUL PUBLIC PARTICIPATION.

Washington law requires that the City provide interested parties with a "full opportunity" for involvement in the development of the SMP and that the City "shall not only invite but actively encourage participation." RCW 90.58.130 (emphasis added). Also, state regulations provide that the City "shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons." WAC 173-26-090 (emphasis added). "[L]ocal government shall solicit public and agency comment during the drafting of proposed new or amended master programs." WAC 173-26-100 (emphasis added). For governments planning under the Growth Management Act ("GMA"), such as the City, "local citizen involvement strategies should be implemented that insure early and continuous public participation." *Id.* (emphasis added). State regulations further provide that these citizen involvement strategies should include the following measures, among others (1) each planning jurisdiction should endeavor to involve the broadest cross-section of the community, so that groups not previously involved in planning become involved; (2) the public should be

involved at the earliest possible time in the process of comprehensive planning under the act, beginning with a public visioning process; (3) full use should be made of the planning commission as a liaison with the public; (4) once the plan is completed in draft form, or as parts of it are drafted, a series of public meetings or workshops should be held at various locations throughout the jurisdiction to obtain public reaction and suggestions; (5) at each stage of the process when public input is sought, opportunity should be provided to make written comment; (6) each jurisdiction should make every effort to collect and disseminate public information explaining the act and the process involved in complying with it; (7) whenever public input is sought on proposals and alternatives, the relevant drafts should be reproduced and made available to interested persons; and (8) all comments and recommendations of the public should be reviewed and adequate time should be provided to evaluate and respond to public comments. WAC 365-195-600(2)(a).

The City's public participation process falls short of these requirements. The City failed to conduct a visioning process in connection with the current draft SMP. It also failed to solicit public participation during the drafting of the SMP, instead developing, seeking Department of Ecology comments, and revising an initial draft last year behind closed doors. Now, while it has made some concessions in the wake of public outcry, the City still has not developed a public participation program that allows for meaningful dialogue with the public. The City's public participation program is currently limited to (1) two public open houses; (2) two public hearings before the Planning Commission; and (3) an unspecified number of City Council hearings. The Planning Commission will hold other workshops and meetings, but the public is not invited to provide testimony. This leaves the public unable to correct factual errors in the materials and presentations given to the Commission. In addition, the City does not plan to respond to the voluminous public comment provided already until well after the last scheduled public hearing before the Planning Commission. Thus, the process as currently designed fails to provide for a dialogue between the City and the public. The public is not "fully involved" in the drafting process as required by law.

In order to remedy these significant problems, the City must develop and implement a meaningful public participation program. This program should include the formation of a Citizens' Stakeholder Committee to review and comment on the draft SMP. In addition, the Planning Commission should not act on draft SMP until after staff has revised the draft SMP to respond to public comment and the public has had the opportunity to review and comment on these revisions.

II. THE PLANNING COMMISSION MUST RECOMMEND DENIAL OF THE SMP AS CURRENTLY DRAFTED.

As currently drafted, the SMP inflicts burdensome, inequitable, illegal and unconstitutional limitations on shoreline properties. Accordingly, unless significant changes are made to the Draft SMP, the Planning Commission must recommend denial.

A. The SMP imposes an illegal tax.

Under the recent Washington appellate court decision in *Citizens' Alliance of Property Rights v. King County*, __ Wn.App.3d. ___, 2008 WL 2651455 ("*Citizens Alliance*"), the proposed river buffers,

among other things, are an illegal tax. In this case, the court reviewed King County's critical areas ordinance. The court focused on the portions of the ordinance limiting clearing on rural properties. These clearing limits varied depending on parcel size and location, limiting new clearing to 50 percent of the property in some cases. The court determined that the clearing limitations were indirect taxes, fees or charges on development. Therefore, they were subject to the requirements of state law codified at RCW 82.02.020.

Under RCW 82.02.020, the government must show that the conditions are tied to a specific, identified impact of a development on a community. The government bears the burden of showing that the condition is reasonably necessary as a direct result of the development. In other words, the conditions must be both related to the impacts of development and proportional to these impacts. They cannot be imposed for the purpose of mitigating pre-existing problems. In *Citizens Alliance*, the court determined that the clearing limitations did not meet the requirements of RCW 82.02.020 and were therefore illegal.

Several provisions of the Draft SMP suffer from the same defect as King County's critical areas ordinance. The Draft SMP proposes buffers of either 100'- or 125-feet in commercial areas adjacent to the Green/Duwamish River, similar to the clearing limitations in King County's critical areas ordinance struck down in *Citizens Alliance*. Yet the City has not made a showing that these buffers are directly related and proportional to the impacts caused by the specific future development of the affected parcels. Staff has advanced various justifications for the buffer width at different times. These justifications include a desire to allow for future improvement of existing levees by increasing their slope to 2.5:1[1], inclusion of a bench for habitat improvement and improving access for maintenance. However, staff has never explained how these improvements are linked to impacts caused by development of the affected parcels.

To the contrary, the Draft SMP acknowledges that the buffers would improve an existing condition, not mitigate future impacts. The Draft SMP makes it abundantly clear that its purpose is not only to protect (achieve "no net loss") but also to restore and improve habitat:[2]

> [A] minimum buffer will be established for each shoreline environment and allowed uses will be designated for the buffer area along the river and the remaining shoreline jurisdiction. This system is intended to facilitate the City's long-range objectives for land and shoreline management, including:
>
> - Providing no net loss of ecological shoreline functions;
> - Providing for habitat protection, enhancement, and restoration to improve degraded shoreline ecological functions over time and protection of already restored areas.

1/ Staff has given conflicting justifications for this slope. At the Planning Commission work session on August 7, 2008, staff said that the slope was required in order for King County to continue to maintain the levees. At the work session on September 17, however, the justification given (for the first time) was prevention of speculative future river bank scour.

2/ See *Skagit County v. Western Washington Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007) (distinguishing protection from restoration).

Draft SMP, p. 46 (emphasis added).

> The purpose of the Urban Conservancy Environment is to protect ecological functions where they exist in urban and developed settings, and restore ecological functions where they have been previously degraded.

Id., p. 48 (emphasis added).

> The purpose of Urban Conservancy River Buffers is to:
> - Protect existing and restore degraded ecological functions of the open space, flood plain and other sensitive lands in the developed urban settings;
> - Ensure no net loss of shoreline function when new development or redevelopment is proposed;
> - Provide opportunities for restoration and public access.

Id. (emphasis added).

> The buffer width of 100 feet allows enough room to reconfigure the river bank to achieve a slope of 2.5:1, the "angle of repose" or the maximum angle of a stable slope and allow for some restoration and improvement of shoreline function through the installation of native plants and other habitat features.

Id., p. 49. Yet, the City may not impose the cost of habitat restoration and improvement on private property owners. Instead, under RCW 82.02.020 and *Citizens Alliance*, the City may only impose buffers if they are related and proportional to the impacts of development.

If the City fails to take into account the requirements of RCW 82.02.020, it will leave itself open to claims by every affected owner along the shoreline. In light of the clear ruling in *Citizens Alliance* case, if the City adopts the proposed buffer, it could be liable for damages caused by buffer requirements under RCW 64.40.

B. The SMP includes requirements not authorized by the Shoreline Management Act ("SMA").

The SMA and its implementing regulations do not authorize the City to place the burden of shoreline restoration, enhancement or improvement on private property owners. Instead, the regulations adopted by the Department of Ecology ("DOE") to implement the SMA provide unequivocally that:

> The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulations alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable,

> statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property. Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.

WAC 173-26-186(5) (emphasis added).

The regulations also state:

> Local master programs shall include regulations and mitigation standards ensuring that each permitted development will not cause a net loss of ecological functions of the shoreline; local government shall design and implement such regulations and migration standards in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.

WAC 173-26-186(8)(b)(i) (emphasis added).

In addition, they provide:

> Some master program policies may not be fully attainable by regulatory means due to the constitutional and other legal limitations on the regulation of private property. The policies may be pursued by other means as provided in RCW 90.58.240.

WAC 173-26-191(1)(a).

RCW 90.58.240 specifies non-regulatory means for achieving shoreline master program policies:

> In addition to any other powers granted hereunder, the department and local governments may:
>
> (1) Acquire lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in concert with other governmental entities, when necessary to achieve implementation of master programs adopted hereunder;
>
> (2) Accept grants, contributions, and appropriations from any agency, public or private, or individual for the purposes of this chapter;
>
> (3) Appoint advisory committees to assist in carrying out the purposes of this chapter;
>
> (4) Contract for professional or technical services required by it which cannot be performed by its employees.

Thus, rather than providing authority for illegal and unconstitutional development regulations, the SMP expressly recognizes that local governments should pay for lands and easements when it needs them to implement shoreline master program policies and should seek public funding to implement some of its shoreline master program goals.

C. The SMP effects an unconstitutional taking of private property without just compensation.

The public access requirements of the draft SMP violate constitutional prohibitions against governmental taking of property without compensation. The U.S. Supreme Court addressed this very issue in *Nollan v California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In this case, the Nollans sought a permit to replace an existing residence on a beachfront lot located between two public beaches. The Coastal Commission granted the permit with the condition that the Nollans allow public access between the two beaches across a portion of their property. The U.S. Supreme Court invalidated the condition because it was not related to a specific impact of the development. The required nexus was absent. Accordingly, the condition constituted an unconstitutional taking. If the state wanted a public easement across the Nollans' property, the Court held, it must pay for one.

Similarly here, the Draft SMP proposes to require property owners to grant to the public a right of access to their shoreline properties as a condition of receiving development permits. Yet there is no requirement for a demonstrated nexus between impacts created by specific development projects and the public purpose asserted as support for the public access requirement. Permit conditions imposed under the Draft SMP will directly conflict with the principles established by *Nollan*. As the U.S. Supreme Court held in *Nollan*, the City may not require shoreline owners to provide public access across their properties without full and fair compensation.

D. The SMP is inconsistent with the Comprehensive Plan in violation of the Growth Management Act.

The Growth Management Act ("GMA") requires that the development regulations adopted by a city must be consistent with and implement its comprehensive plan. RCW 36.70A.040. In addition, a city's comprehensive plan must be internally consistent. RCW 36.70A.070. The goals and policies of a city's approved shoreline master program are considered an element of the city's comprehensive plan. RCW 36.70A.480. All other portions of the shoreline master program, including use regulations, are considered a part of the city's development regulations. *Id.*

Here, the Draft SMP is inconsistent with the City's Comprehensive Plan. Among other inconsistencies, the enormous burden the Draft SMP places on shoreline properties renders it inconsistent with various goals and policies calling for economic development, including:

- Goal 2.1. "Continuing enhancement of the community's economic well-being."
- Policy 2.1.12. "Promote Tukwila as a regional crossroads for commerce."
- Policy 2.1.13. "Promote economic use of industrial lands outside the MIC . . . Such lands should be preserved for industrial uses, achieved through *appropriate* buffering requirements and use restrictions. . . ." (Emphasis added.)

This is a fatal flaw. The City must review the Draft SMP to identify its land use and economic impacts. The City must then revise the Draft SMP and revise it as necessary to ensure that it is fully consistent with the Comprehensive Plan.

III. CONCLUSION

In sum, La Pianta requests that you: (1) provide for meaningful public participation in the SMP update process; and (2) recommend denial of the current Draft SMP due to its numerous deficiencies.

Thank you for your attention to this matter.

Sincerely,

Courtney Kaylor

Courtney A. Kaylor

CAK:ldc

cc: Client
Jack Pace
Carol Lumb

McCULLOUGH HILL, PS

August 27, 2008

VIA ELECTRONIC MAIL

Jack Pace, Responsible Official
City of Tukwila
6300 Southcenter Boulevard
Tukwila, Washington 98188

Re: Comments on DNS
Draft Shoreline Master Program Update

Dear Mr. Pace:

We are writing on behalf of La Pianta, LLC to provide comments on the determination of non-significance (DNS) dated August 13, 2008, issued by the City for the proposed revisions to the Shoreline Master Program (SMP) for the City of Tukwila. Our comments are as follows:

- The SEPA Staff Report dated August 13, 2008 (provided on the City's website) is intended to outline the City's review of environmental issues associated with the SMP, and to explain the decision making process which led to the issuance of the DNS. Unfortunately, the SEPA Staff Report is incomplete. While the first page of the SEPA Staff Report does address the proposed SMP revisions, the remaining six pages relate to an entirely different project (i.e., the conversion of the former Rhone-Poulenc site on the Duwamish to an automobile storage yard in 2004). We assume this is an administrative error, but nevertheless it is impossible to evaluate or meaningfully comment on the DNS without the appropriate SEPA Staff Report. The City must reinitiate the comment period on the DNS, following public disclosure of the actual SEPA Staff Report.

- The DNS is predicated on the assumption that the City's Comprehensive Plan will be amended, following adoption of the revised SMP, to ensure consistency between the SMP and the Comprehensive Plan. *See, for example*, SEPA Checklist at 1, 21. This is backwards. The City must evaluate the proposed SMP revisions in light of the current Comprehensive Plan, both in the SEPA review of the proposal and in subsequent substantive review. This step has not occurred, and so it is inappropriate to issue the DNS until the City has properly conducted this evaluation. The DNS should be withdrawn, the SEPA checklist amended to address this issue, and a new SEPA threshold determination made.

- The DNS is predicated on the assumption that mitigation will be achieved through new requirements to "restore" degraded shorelines in connection with shoreline permitting under the revised SMP. *See, for example*, SEPA Checklist at 15, 16, 22, 34. This is an inappropriate assumption, since the City cannot legally require property owners to "restore" shoreline

areas to an earlier condition, in order to remedy pre-existing degradation. Further, the applicable guideline under the Shoreline Management Act calls for "no net loss" of ecological value in the review of individual proposals for substantial development, not "restoration." The SEPA Checklist should be revised to correct this.

- The DNS is based on erroneous information in the SEPA Checklist regarding Corps of Engineers "requirements" regarding planting on levees. The SEPA Checklist assumes that the Corps "prohibits" planting of larger plant material on levee faces. *See* SEPA Checklist at 22. This assumption becomes the basis for requiring applicants to provide a new riparian planting area as "mitigation" under shoreline permits. It is FEMA, however, that certifies levees, not the Corps, and while FEMA may look to the Corps for guidance on levee planting, there is no FEMA "requirement" on this topic. It is possible for FEMA to certify a levee even if it is not consistent with Corps planting guidelines. The DNS should be withdrawn, the SEPA checklist amended to address this issue, and a new SEPA threshold determination made.

- The SEPA regulations encourage agencies to describe non-project proposals in broad terms, focusing on objectives rather than "preferred solutions" or specific methods or regulations. WAC 197-11-060(3)(a). The SEPA Checklist and the DNS fail to take this approach, focusing instead on a highly specific regulatory proposal. Further, it appears that this "preferred solution" has undergone previous rounds of internal and interagency review to refine the proposal, without the benefit of environmental assessment under SEPA. The SEPA Checklist should be revised to consider a broader range of regulatory solutions, instead of focusing exclusively on the current draft of the revised SMP.

We appreciate the opportunity to provide these comments on the DNS.

Sincerely;

G. Richard Hill

GRH:ldc

cc: La Pianta, LLC

McCULLOUGH HILL, PS

August 28, 2008

Tukwila Planning Commission
c/o Department of Community Development
6300 Southcenter Blvd., #100
Tukwila, WA 98188

RE: Shoreline Master Program Update

Dear Commissioners:

This is on behalf of La Pianta LLC ("La Pianta"). La Pianta respectfully asks the Planning Commission to take the following actions:

1. Direct staff to assemble a Citizens' Stakeholder Committee to review and comment on the Shoreline Master Program Update ("SMP Update"), prior to any Planning Commission action on the SMP Update;

2. Continue the public hearing on the SMP Update to allow the public to comment on the Stakeholders' review and recommendations, as well as to allow the public a meaningful opportunity to review and comment on the SMP Update, as it may be amended in the coming weeks; and

3. Direct staff to prepare responses to La Pianta's comments on the SMP Update which are enclosed with this letter, and to prepare responses to all citizen comments submitted on the SMP Update.

As we are sure the Commissioners understand, the SMP Update is complex, controversial, technical, and will result in severe economic impacts on affected property owners. In that light, state law and principles of fundamental fairness mandate that adequate time be provided for public comment on the SMP Update, that the City consider in a meaningful manner the recommendations of a convened Citizens' Stakeholder Committee, and that all public comments on the SMP Update be evaluated and addressed.

The attached comments, prepared by La Pianta, address in some detail La Pianta's concerns about the lawfulness, fairness, and propriety of the provisions of the SMP Update. In particular, La Pianta is surprised that, given the immense economic ramifications of the SMP Update to both property owners and the City, there is virtually no analysis of the economic impacts of the proposal, despite the fact that applicable regulations require such an analysis.

Finally, we must point out that the handout distributed by City staff at the public open house materially misrepresents the impacts of the SMP Update. How can the public "participate" in development of the SMP Update if the public is misinformed as to its contents? For example, with

respect to the Urban Conservancy designation, the handout compares existing conditions with the SMP Update. The sketch depicts a building under existing conditions at the same location as under the SMP Update. However, under existing conditions, that same building could be located over 100 feet closer to the shoreline. This is a drastic change which is not acknowledged in the handout. Moreover, the sketch shows commercial parking located in the buffer area under the SMP Update. The proposed regulations, however, would preclude commercial parking in those areas. Finally, in the handout's chart which compares allowed uses in the current SMP to allowed uses in the proposed SMP, City staff fails to indicate the many restrictions, including height, bulk, and location, which the proposed SMP would impose on allowed uses. It is indeed impossible to understand the impacts of the proposed SMP from the handouts distributed at the public open house. These handouts should be revised and re-distributed at a new open house.

La Pianta appreciates the Commission's consideration of these requests, and looks forward to working cooperatively with the City to the development of an SMP Update that complies with applicable law while addressing the legitimate concerns of affected property owners.

Sincerely,

G. Richard Hill

GRH:ldc

cc: Client

Comments to the July 2008 Draft Shoreline Master Program

Recurring Issues: The five issues noted below recur throughout the plan. Rather than repeat the entire text of our concern each time it occurs in the plan, the following issues will be described here, and referenced in the body of comments as appropriate.

1. **"Illegal tax Issue"** - The Washington appellate court recently decided Citizens' Alliance of Property Rights v. King County, ___ Wn.App. ___, ___ P.3d ___, 2008 WL 2651455 ("CAPR case"), in which the court invalidated a portion of King County's sensitive areas ordinance. The County's blanket imposition of clearing limits on rural zoned property irrespective of the actual impact caused by the specific development of those properties was deemed an illegal tax under RCW 82.02.020. Similarly, the City of Tukwila is proposing in its plan to take property from owners along the shoreline without first determining whether their development proposals cause any adverse impact that requires mitigation. The City may not adopt a shoreline building setback regulation that constitutes a one-rule-fits-all exaction. To be valid, the City must prove that its proposed exactions are reasonable, and are proportional to a specific identified adverse impact.

2. **"Ultra Vires Issue"** - In the plan, the City of Tukwila repeatedly oversteps the bounds of its legal authority to regulate property. The Shoreline Management Act, Chapter 90.52 RCW, limits the City's regulatory authority to impose regulations. The City is limited to the adoption of regulations that "preserve the natural character of the shoreline." In other words, the regulations must be designed only to prevent any additional harm to the habitat. As was made clear in Skagit County v. Western Washington Hearings Bd., 161 Wn.2d 415, 166 P.3d 1198 (2007), the authority to "prevent" or "protect" habitat does not include the authority to "restore" or "enhance" habitat. In its plan, the City exceeds its authority, because it proposes regulations intended to restore and enhance habitat. Washington law does not allow the City to adopt such regulations.

3. **"Public Participation Issue"** - Washington law requires the City to provide interested parties with a "full opportunity" for involvement in the development of the SMP and that the City "shall not only invite but actively encourage participation." RCW 90.58.130 (emphasis added). Also, state regulations provide that the City "shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons." WAC 173-26-090. In addition, "local government shall solicit public and agency comment during the drafting of proposed new or amended master programs." WAC 173-26-100. For governments planning under the Growth Management Act ("GMA"), such as the City, "local citizen involvement strategies should be implemented that insure early and continuous public participation." Id. State regulations further provide that these citizen involvement strategies should include the following measures, among others:

(1) each planning jurisdiction should endeavor to involve the broadest cross-section of the community, so that groups not previously involved in planning become involved, (2) the public should be involved at the ***earliest possible*** time in the process of comprehensive planning under the act, (3) full use should be made of the planning commission as a liaison with the public, (4) once the plan is completed in draft form, or as parts of it are drafted, a series of public meetings or workshops should be held at various locations throughout the jurisdiction to obtain public reaction and suggestions, (5) at each stage of the process when public input is sought, opportunity should be provided to make written comment, (6) each jurisdiction should make every effort to collect and disseminate public information explaining the act and the process involved in complying with it, (7) Whenever public input is sought on proposals and alternatives, the relevant drafts should be reproduced and made available to interested persons,

and (8) all comments and recommendations of the public should be reviewed. Adequate time should be provided between the time of any public hearing and the date of adoption of all or any part of the comprehensive plan to evaluate and respond to public comments. As is immediately apparent when the City's efforts to inform the public is compared against the recommendations set forth in state law and regulations, the City has failed to meet the requirements for public participation for a plan of this importance to the community, severe economic impact, and complexity.

4. **"Constitutional Takings Issue"** - The plan proposes to require property owners to grant to the public a right of access to their shoreline properties as a condition of receiving development permits, with no demonstrated nexus between impacts created by specific development projects and the public purpose asserted as support for the exaction. This type of regulation/exaction is in direct conflict with federal and state constitutional law. The City may not require owners to provide that access without full and fair compensation. See Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

5. **"Failure to review Comprehensive Plan Consistency"** - The draft shoreline plan is inconsistent with the City's comprehensive plan. Under state law, all development regulations must be consistent with the City's comprehensive plan. This inconsistency is a fatal flaw. The City should review the draft plan to address comprehensive plan consistency. No shoreline plan adoption should be proposed until the City has assured itself and the public that the shoreline plan is fully consistent with the City's comprehensive plan.

Item #	Section	Page	Comments
1	§1.1	1, ¶1	The City notes that the SMP is intended to promote the reestablishment of shore functions "where possible." The City cannot use its shoreline development regulations to impose on individual property owners a duty to effect a reestablishment of shoreline functions. See the Illegal Tax Issue and the Ultra Vires Issue.

STAFF RESPONSE:

2	§1.1	1, ¶3	The second to the last sentence of this paragraph suggests that the GMA requires only "coordinated" efforts at public participation. However, RCW 36.70A.020(11) and RCW 26.70A.030 will require the involvement and participation by all interested parties in the preparation of these development regulations, including the citizens of the city. The City has failed to alert or involve the public to the preparation of this draft SMP. This draft was issued as a final product, following undisclosed rounds of internal and interagency review, in August 2008, several years after the City commenced the process to update its SMP.

STAFF RESPONSE:

3	§1.2(B)	4, ¶2	In the last sentence, the City notes that the TUC and MIC shall be redeveloped and such redevelopment will affect the character of the river. How will re-development of these areas affect the "character of the river" behind the existing armored levees of the 205 Project area?

STAFF RESPONSE:

4	§2.1	5	In the first bullet point of this section, the City asserts that it has included a citizen participation process, but as discussed above in the Public Participation Issue, the City has not complied with state requirements. The City needs to implement a proper public participation process with affected stakeholders and citizens prior to final review and adoption of the SMP.

STAFF RESPONSE:

5	§2.2	5	The elements required by the SMA include "economic development." However, the proposed plan severely restricts the ability to develop the first 200 feet of the shoreline environment. Indeed, the draft SMP includes discussions of all of the SMP elements *except* "economic development." The City must include a discussion of its goals and policies concerning economic development of the first 200 feet of shoreline environment within the City, treating areas that are already developed separately from undeveloped areas. Furthermore, the City should include a discussion or study determining the actual or estimated costs of those regulations in terms of impaired development potential of the shoreline area, as well as an estimate of the lost tax revenues upon full implementation of this regulation. The Plan also should show how many commercial buildings will be declared nonconforming. Is there a list of buildings and other structures, e.g. parking lots, etc., that will be rendered nonconforming upon adoption of a plan in this form?

STAFF RESPONSE:

6	§2.2	5	In this section, the City discusses the elements of the SMP and notes other applicable laws directing the implementation of the SMP. However, the City has failed to include a discussion of laws that limit the application of the SMP and the City's authority to impose exactions from the owners of property along the shoreline. Limitation of the City's authority is a pertinent discussion for the plan. A separate section should be added that discusses the limitation of the City's legal authority, including a discussion of constitutional limitations, as well as the Illegal Tax Issue and the Takings Issue.

STAFF RESPONSE:

7	§2.3	6, ¶5	The City should identify each individual step taken by the City in formulating this proposed draft SMP, and note whether public participation was involved for each step. If not, then the City should explain why the City did not include public participation at that point. For example, the City did not cause its draft July 2007 plan submitted to Ecology to be reviewed by the public. As noted above, this lack of public involvement presents a Public Participation Issue.

STAFF RESPONSE:

8	§2.4	7	The draft SMP asserts that the City "continued the previously stated citizen involvement program." This is untrue. Public participation efforts ceased eight years ago and have only been reinitiated in the last three weeks, following rounds of internal and interagency review and revision of the plan not open to the public. The City's failure to involve the public in the review and development of this plan is a Public Participation Issue.

STAFF RESPONSE:

9	§2.4	7-8	Citizen outreach activities conducted nearly a decade ago on a different draft plan are not sufficient to meet the public participation obligations imposed by state law (as explained in the Public Participation Issue). The City will need to cure its failure to meet state law by re-opening the SMP process to allow for meaningful comment from the public.

STAFF RESPONSE:

10	§2.4	7	As explained in the Public Participation Issue, the City should detail the actual "citizen involvement" in each step of the process to create the current plan. What "interested parties" reviewed this plan?

STAFF RESPONSE:

11	§2.5	8	The second bullet point states that citizen involvement included the preparation of a Shoreline Background Report from 1993 *(15 years ago)*. Was any part of this report adopted and incorporated into this draft plan? Where? Which sections?

STAFF RESPONSE:

12	§2.5	8	The City claims that citizen involvement included the Tukwila Tomorrow citizens group from 2000's. That group prepared a report for the draft SMP at that time. What happened to the recommendations from that group? Were they incorporated into this draft plan? Which sections? For those recommendations not incorporated into this plan, why not? A detailed explanation should be provided, especially since the City claims that it is building off of the efforts of that group.

STAFF RESPONSE:

13	§2.5	7-8	The dates of the activities described in bullet points 1, 3 though 6, and 8 were not included and should be added.

STAFF RESPONSE:

14	§3	10	"Flood plains". Shouldn't the delineation of the flood plains be the sole province of FEMA? Why does the City want to bring an alternative definition from the FEMA determination? What is the technical, Best Available Science basis for the use of a different definition?

STAFF RESPONSE:

15	§4.3(B)	20, ¶4	In the last sentence, the City notes that development of the shoreline has the potential to provide "...restoration of habitat..." "But as noted in the Ultra Vires Issue, the City will not be allowed to impose a development regulation to require restoration of habitat.

STAFF RESPONSE:

16	§4.4	21, ¶2	The City omits key legal constraints on implementing restoration and potential use conflicts of the Tukwila, namely, legal constraints such as the Illegal Tax Issue and the Ultra Vires Issue that limit the ability of City to impose regulations implement those goals.

STAFF RESPONSE:

17	§4.4	22, ¶2	The second paragraph notes that the laying back of levees to create mid-bench slopes would provide habitat and require additional easement area. However, the Plan does not discuss the legal authority of the City to "take" from property owners additional easement area for such habitat area. If the City intends to acquire such land pursuant to condemnation, has the City determined if such funds are available? If at the time of a building permit application, will the City forego such a requirement if funds are not available at such time? Setting aside the above legal issue, the requirement of a bench seemingly is intended to improve habitat, and the Ultra Vires Issue arises again.

STAFF RESPONSE:

18	§5.1	25	The City developed a Draft Shoreline Restoration Plan in 2007 that was "finalized" in May, 2008 without any input from the public, which gives rise to a Public Participation Issue. A failure to satisfy the Public Participation Issue would be fatal to this draft plan.

STAFF RESPONSE:

19	§5.2	26	Comment to Table 1: In the second row, what specific BMPs for stormwater are being considered that differ from the City's current city-wide regulations for stormwater?

STAFF RESPONSE:

20	§5.4	27-28	The City wants to "enlarge channel cross-sectional area," for the purpose of increasing flood storage. However, FEMA has certified certain of the levees in the City, which includes certifying that properties behind those levees are not within the floodplain. Why is the City increasing channel cross section area in every part of the City, even in those areas with FEMA certified levees?

STAFF RESPONSE:

21	§5.4	27-28	The City again discusses actions intended to restore the ecosystem. However, the goal of the SMP is to regulate development so that "no net loss" of shoreline function occurs. The City will need to revise its draft plan to bring it within the boundaries of its authority to regulate the shoreline (The Ultra Vires Issue).

STAFF RESPONSE:

22	§6.1	30	New Policy 5.1.2 Bullet Point #1: Is the goal of "no net loss" consistent with the remainder of the policy, which will effect an enhancement of the shoreline? Again, the Uncertainties Issue is applicable here.

STAFF RESPONSE:

23	§6.2	31	Policy 5.2.1: The City should list those portions of the SMP that exceed the obligations set forth in the King County Flood Hazard Management Plan. For example, the County requires that levees within the 205 project area meet Army Corps of Engineers ("ACOE") regulations. The City's proposed regulations in this plan exceed the County's requirements.

STAFF RESPONSE:

24	§6.3	32	Policy 5.3.4: Why has the City deleted the policy of installing levees for the purposes of protecting life, safety and welfare of the public? Is the flooding of lands within a heavily urbanized City a greater benefit to the people than the creation of flood control works that protect life and property? Wouldn't a better approach be to retain this policy and try to apply the other goals and policies to the extent that conditions permit?

STAFF RESPONSE:

25	§6.3	32	Policy 5.3.4: The prohibition against the construction of new flood control facilities unless constructed to incorporate habitat restoration features is a "taking" of property. Reconstruction of levees to a flatter slope may be defensible for reasons of safety, but that reason only serves to justify the government's need to take the land. Federal and state constitutional law, statutes and case law demand that the City pay just compensation for these takings. Also, the City's implementation of policies to accomplish this goal will violate the Illegal Tax Issue.

STAFF RESPONSE:

26	§6.4	34	Is the policy of removing armored shorelines feasible in the City of Tukwila while respecting "private property rights"? Removing armored shorelines will result in more flooded land, leaving less developable land. The effect of less land in a heavily urbanized city is immediately apparent. For example, has the City provided a detailed analysis of the expected increase of population within the city, the amount of land required to handle additional population, the effect of removing a significant amount of land from within the heart of the City, and more practically, where armored shorelines can be safely removed and the potential of increased flooding, displaced citizens and damaged property? In addition, has the City studied the economic impact from the loss of extremely valuable land and buildings, and an estimate of the loss to the City's tax base by the removal of armored shorelines?

STAFF RESPONSE:

27	§6.4	34	New Policy 5.4.5: Obtaining additional easement areas through this draft SMP will constitutes an Illegal Tax and will be Ultra Vires.

STAFF RESPONSE:

28	§6.6	36	New Policy 5.6.3: The City notes that it will "incorporate river access requirements..." in the shoreline, but it will not be able to do so under this plan and its proposed regulations without running afoul of the Illegal Tax Issue and the Ultra Vires Issue.

STAFF RESPONSE:

29	§6.6	37	New Policy 5.6.5, 5.6.8 and 5.6.11: Are the inclusion of amenities such as benches, drinking fountains, public parking, etc. an obligation of the City or private property owners? Who will maintain these improvements? Who will be liable for injuries? Has the City planned for the added expense of maintaining public access areas along the shoreline? Property owners will not maintain these areas because of the expense and liability.

STAFF RESPONSE:

30	§6.9	39	New Policy 5.9.2: The obligation to protect vegetation and restore degraded riverbanks is costly, and the City's attempt to impose this obligation on owners will be Ultra Vires.

STAFF RESPONSE:

31	§6.9	39	New Policy 5.9.2. How is the City determining that developments along the shoreline impact fish? Does development along the shoreline behind armored levees impact fish? The City must review specific projects first before concluding that impacts will occur and only then require appropriate mitigation.

STAFF RESPONSE:

32	§6.10	40	New Policy 5.10.4. The City should be clearer in stating the reason for setting back levees. The fact is that the laying back of levees is not related to the improvement of shoreline habitat functions. The increase of the buffer to 125 feet in the UCZ requires the following steps (1) the increase of the levee slope from current conditions to 2.5:1, (2) the construction of a 10 foot mid-slope bench, (3) the increase of the top of levees from 13-14 feet to 20 feet, and (4) the encumbrance of an additional 10 feet on the landward side of the levee for an access easement. The purpose for each of those requirements are as follows, respectively: (1) reduce maintenance costs, (2) habitat creation, (3) public path along the shoreline, and (4) reduce maintenance costs. As is apparent, the primary reason for increasing the buffers is to reduce maintenance costs and to provide public paths. This conclusion was confirmed by Ryan Larson of the City when he provided the critical testimony at the Planning Commission workshop on August 7, 2008. Mr. Larson noted that the laying back of levees was required so that King County would accept the responsibility of maintaining the levees. King County would not accept the obligation of maintaining levees less than 2.5:1 because of the increased costs of maintaining steeper levees. Mr. Ryan Larson's testimony of the true reason for the increased riverside setbacks is nowhere to be found in the draft SMP. Instead, the plan states that the laying back of levees is required to improve shoreline habitat functions. So, the financial cost of maintaining the levees is the primary reason for increasing the riverside setbacks, as opposed to environmental concerns. Although the costs of the levees is a legitimate concern, the levees benefit the entire city of Tukwila. In other words, the costs of maintaining those levees should be borne by everyone, and not just the owners of property along the shoreline.

			Mr. Larson was also incorrect concerning the area within the 205 Project area. King County can maintain and will permit steeper levees. As noted elsewhere, the Army Corps of Engineers only requires a 2:1 sloped levee, and does not require a bench, which standard was adopted by King County when it adopted its current Flood Hazard Management Plan. The City must revise the SMP to reflect accurately the rationale indicated by Mr. Ryan Larson's testimony, e.g. reducing maintenance costs, and the City must prepare plans for financing the acquisition of the easements necessary for the laid-back levees. The taking of private shoreline property to reduce the maintenance costs of levees under the auspices of the SMA is unlawful, unless full and fair compensation is first paid.
			STAFF RESPONSE:
33	§7.2	43	The City states that "restoration opportunities are numerous...and activities that provide restoration...should be prioritized." What are these opportunities and where are they located?
			STAFF RESPONSE:
34	§7.4	46	The City should include the Tukwila South PAA area within the High Intensity Zone, or within a more modified Urban Conservancy Zone. As identified in the EIS prepared for the Tukwila South development, Tukwila South (including the annexation area) shall be developed into a high density area with an array of commercial and residential uses that is different from every other zone of the City. The focus of the property will be to develop it into a highly productive area generating income and opportunity for the citizens of the city of Tukwila. The definition of "High Intensity" would fit this area more appropriately than the "Urban Conservancy" zone.
			STAFF RESPONSE:
35	§7.6	49	The City states that it requires a 20 foot setback from the top of the new slope of the laid-back levees, but it does not state the reason for the need of the 20 foot area. Most levees in Tukwila do not have a 20 foot top of the levee now (most have a 13'/14' top). Is the 20 feet related to some shoreline, habitat, or levee issue? Is the 20 foot area required to meet the City's desire for a 20 foot public path along the shoreline as noted in Chapter 11.32?
			STAFF RESPONSE:

36	§7.6	49	Why does the City need a 10 foot bench in the middle of the levee?

STAFF RESPONSE:

37	§7.7	51	The City permits an owner in the HIE to provide a slope meeting the requirements set forth in the last paragraph on page 51, but the owner does not need to provide a mid-bench slope nor a 10 feet access easement on the back side. Why is this zone treated differently from the area south of I-405?

STAFF RESPONSE:

38	§9.1	60	Comment on Bullet #4. Is it true that the new SMP will apply with the change in occupancy for a building? What specific application is triggering this requirement? A change in tenancy typically occasions a building permit application for tenant improvement work, but is that enough to trigger compliance with all of the requirements of the SMP? The triggers in the plan that will cause very expensive obligations that are not proportionate nor just. This provision should be deleted.

STAFF RESPONSE:

39	§9.1	60	The City states that nonconforming uses will be governed by current TMC 18.70. The loss of development rights following destruction of buildings by fire and earthquake would be an incredible hardship to existing owners who have no desire to change their current use. At the very minimum, owners and purchaser should be permitted to continue the existing use, whether such buildings need to be repaired or reconstructed.

STAFF RESPONSE:

40	§9.2(A)	60	The requirement to site new development to allow a natural bank inclination of 2.5:1 is a blanket exaction and not tied to a specific impact from the development of that specific parcel. This requirement constitutes an Illegal Tax Issue.

STAFF RESPONSE:

41	§9.2(A)(5)	61	The requirement that short plats must be designed to require public access to the river, without compensation, is a Constitutional Takings Issue.

STAFF RESPONSE:

42	§9.3(A)(2)	62	The requirement that short plats must be designed to require public access to the river, without compensation, is a Constitutional Takings Issue.

STAFF RESPONSE:

43	§9.3(B)(3b)	62	If the City is requiring access in Section 9.3(A)(2), under what circumstances would the condition that if access is provided, then setbacks can be reduced ever be true? Why is the TUC being treated differently? Also, neither of the two conditions which permit exceptions to the side yard and front yard reduction are tied to a specific impact.

STAFF RESPONSE:

44	§9.3(B)	62	It is unreasonable to limit loading docks and service areas to the landward side of the buildings unless this requirement renders the project "financially unfeasible."

STAFF RESPONSE:

45	§9.3(c.)	63	Why is the City imposing a height restriction? The underlying zoning height limitation is 115' in the TUC and TVS area. Is it appropriate to limit building heights in excess of the height requirements of the underlying zoning regulations for the sake of "public view"? Has the City calculated the amount of lost value to owners and lost revenue to the City because of the imposition of this height restriction? Has there been any balancing whatsoever with regards to the costs of "public views" and private property owners' rights? The Shoreline Management Act allows increased heights if the views of a substantial number of upland residents are not unduly impacted. In the TUC and TVS area, there would not be any such impact, so greater heights are warranted.

STAFF RESPONSE:

46	§9.4	64	This section appears to create a standard for stormwater different from the city-wide stormwater standard. Why is the City creating a different standard for the shoreline area?

STAFF RESPONSE:

47	§9.4©	64	This section should be revised to prohibit any shoreline development that causes an increase in surface runoff that is not mitigated. Nearly all development will result in increased runoff. That is why owners provide mitigation. The sentence, as written, would prevent any development that increases runoff AND require mitigation.

STAFF RESPONSE:

48	§9.4(d)	64	Will the City require shoreline restoration for the area disturbed by the new or existing outfall, or require restoration of the entire shoreline owned by the property owner?

STAFF RESPONSE:

49	§9.4(g)	64	What are "rain gardens," and what criteria will be imposed by the City?

STAFF RESPONSE:

50	§9.5(D)	65	The City should prohibit repair of only those existing structures that result in permanent, significant adverse impacts to the shoreline.

STAFF RESPONSE:

51	§9.6(B)	66	Designing lots to avoid armoring means that buildings need to be set away from the shoreline, which means less density and development. Is that the goal of the City?

STAFF RESPONSE:

52	§9.8©	69	From a practical standpoint, the list of priorities is illogical, and from a legal standpoint, mitigation should be the first priority. The first item in the list proposes to avoid the impact by requiring owners not to take the action resulting in the impact. Impacts from development can always be avoided if the development never occurs. Restricting development is hardly a practical nor legal solution for private property. Under Washington law, the City may impose regulations only that are proportional to the impact, and related to the development. Prohibiting the action, as the first priority in the list, without determining whether it is proportional to the impact, would not be lawful unless lesser "fixes" would be unavailing to mitigate the impact. The City should reverse the order of priorities, and place mitigation as the first priority on the list.

STAFF RESPONSE:

53	§9.8©	69	What are the criteria the City will use to determine the feasibility and applicability of each priority before moving on to the next item in the list?

STAFF RESPONSE:

54	§9.9(B)	69	The City is interfering too much in an owner's use of its property by requiring parking facilities to be located landward of the shoreline. The City's desire to control the shoreline will destroy an owner's ability to design the property in a manner that best fits the owner's circumstances and needs. Despite the provision for exceptions to this rule in the event of financial infeasibility, City staff are not versed in business economics or the owner's particular circumstances to make this provision manageable. The City should remove this requirement.

STAFF RESPONSE:

55	§9.9(B)	70	Is it true that the City will permit structures only in a portion of the TUC area? Why are other areas of the City treated differently? The City should expand this exception to include the Tukwila Valley South area and the Tukwila South PAA area.

STAFF RESPONSE:

56	§9.9(F)	70	For low impact development techniques, there is a practical difference between a technique that is feasible, and a technique that is "reasonable" from a business standpoint. Many techniques are possible to implement, but are not reasonable to do so because of cost. The City does not but should include a consideration of the cost to the owner in determining whether a low impact development technique is "feasible."

STAFF RESPONSE:

57	§9.10(A)(1B)	71	The requirement to remove non-native vegetation in the shoreline is expensive and burdensome. If the property owner was not responsible for the presence of, or legally planted at the time, the non-native vegetation, the City cannot require the owner to remove it now, because of the Ultra Vires issue.

STAFF RESPONSE:

58	§9.10(B)(2)	71	The proposal that the City can relocate and redesign buildings because of trees is completely unacceptable. Trees can be replanted or replaced. The property owner should control the design of the site.

STAFF RESPONSE:

59	§9.10(B)(6)	71	The obligation to place trees along the shoreline would constitute an enhancement of the shoreline, and would be prohibited for the reasons discussed on the Ultra Vires Issue.

STAFF RESPONSE:

60	§9.10(B)(7)	72	The City needs to clarify how close to the shoreline that dead trees must be allowed to remain.

STAFF RESPONSE:

61	§9.10©(1a/b)	73	The obligation to remove non-native vegetation and plant native vegetation is for the purpose of restoring and enhancing habitat, which is illegal for the reasons discussed in the Ultra Vires Issue.

STAFF RESPONSE:

62	§9.10©(3)		What is the definition of "River Buffer"?

STAFF RESPONSE:

63	§9.10(D)(6)	77	Owners should be able to use pesticides, provided such use complies with all applicable federal and state laws. Owners should not be required to obtain the City's approval of a plan and show no other reasonable alternative exists. As an owner of approximately 2.5 miles of the shoreline, this prohibition against the use of pesticides would be unreasonably onerous.

STAFF RESPONSE:

64	§10.12(B)(12)	98	(7) The addition of a new finding before a mitigation plan may be approved that requires mitigation result in improved functions is an "enhancement" of the shoreline habitat, and is prohibited because of the reasons discussed in the Ultra Vires Issue.

STAFF RESPONSE:

65	§10.12(D)(3)	99-100	(a)-(h) The requirement that minimum performance standards for a mitigation plan result in "improved" habitat again is an enhancement of shoreline habitat, and is prohibited because of the reasons discussed in the Ultra Vires Issue.

STAFF RESPONSE:

66	§11	102-107	The City's requirement for public access across private property as a condition of issuing a permit is constitutionally prohibited pursuant to the reasons stated in the Constitutional Takings Issue. The City's attempt to save this section by including Section 11.6, Exemptions from Provision of On-Site Public Access, is not sufficient to save this Section from being an illegal taking of private property by the city. Furthermore, it is not apparent what problem the City is trying to cure. Rather, the regulation is a blanket exaction untied to any problem caused or exacerbated by the development. Private property owners have a variety of reasons to keep people off of their properties, including, safety, security, liability and privacy, all of which should be respected by the City. The entire provision must be stricken.

STAFF RESPONSE:

67	§12	108-110	The City's requirement that owners design their lots according to the dictates in this regulation is unfeasible and impractical. The entire section should be revised to be a recommendation to owners.

STAFF RESPONSE:

NOTE - THE ABOVE COMMENTS DO NOT CONSTITUTE ALL OF THE OWNER'S COMMENTS. THE LIST CONTAINS THE ISSUES IDENTIFIED BY THIS OWNER AS OF THIS DATE BECAUSE OF THE CONDENSED PERIOD IN WHICH THE OWNER HAS HAD TO REVIEW THE DRAFT SMP AND PROVIDE COMMENT. THE OWNER REQUIRES ADDITIONAL TIME TO UNDERSTAND FULLY THIS DRAFT PLAN AND ITS EFFECTS ON THE OWNER'S PROPERTIES.